83 62

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

JANE JENKINS,

Petitioner,

vs.

PHILIP R. JENKINS, SR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SARAH M. SINGLETON

Post Office Box 2423
Santa Fe, New Mexico
87504-2423
(505) 988-4469

Attorney for
Petitioner

July 13, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals failed to recognize and apply New Mexico substantive law in its review of the District Court grant of summary judgment.

2. Whether, under New Mexico law, the running of the statute of limitations for claims of damages resulting from the tort of assault and battery will bar a claim of damages resulting from the tort of outrage, if both torts arise from the same act.

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit are identified in the caption of this petition.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES Page

AUTHORITIES

REPORT OF DECISION

The petitioner, Jane Jenkins, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit in the case of Jenkins v. Jenkins, an unpublished opinion, entered on March 21, 1983. (Appendix A)

JURISDICTION

The decision sought to be reviewed was dated and entered on March 21, 1983. A petition for rehearing was timely filed on March 29, 1983. The order denying that petition was entered on April 14, 1983.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES

Section 37-1-8, N.M.S.A. 1978. Actions against sureties on fiduciary bonds; injuries to persons or

reputation. Actions must be brought against sureties on official bonds and on bonds of guardians, conservators, personal representatives and persons acting in a fiduciary capacity, within two years after the liability of the principal or the person from whom they are sureties is finally established or determined by a judgment or decree of the court, and for an injury to the person or reputation of any person, within three years.

Section 37-1-10, N.M.S.A. 1978. Minors; incapacitated persons. The times limited for the bringing of actions by the preceding provisions of this chapter shall, in favor of minors and incapacitated persons, be extended so that they shall have one year from and after the termination of such incapacity within which to commence said actions.

STATEMENT OF THE CASE

This case arises from incidents involving the petitioner (plaintiff--appellant below), Jane Jenkins, a resident of the state of New Mexico, and the respondent (defendant-appellee below), Philip R. Jenkins, Sr., a resident of the state of Michigan. Because the case was decided on a motion for summary judgment based on the running of the statute of limitations, the facts will be stated in the light most favorable to petitioner.

Petitioner is the natural daughter of the respondent. From 1969, when she was nine years old, until 1972, when she was 12, respondent repeatedly had unconsented and illicit sexual contact with her. These acts resulted in severe, disabling and permanent psychic injuries to petitioner, which first manifested themselves in January, 1980.

Petitioner reached the age of majority on May 16, 1978. In New Mexico the majority is reached at 18 years of age.

Petitioner filed suit against respondent in federal court on September 8, 1981, under 28 U.S.C. § 1331. The lawsuit stated two claims for personal injuries against the defendant: one based on the tort of assault and battery, and the second based on the tort of outrage. (Appendix D, p. 23a) In support of her claim, plaintiff filed the affidavit of an expert witness in the field of psychiatry, which stated that in the witness's opinion, plaintiff's psychic injuries were not ascertainable and did not manifest themselves until January, 1980. (Appendix E)

Defendant filed a motion for summary judgment based on the running of the statute of limitations for personal injuries. Under § 37-1-8, N.M.S.A.

1978, actions for injuries to the person must be brought within three years. In § 37-1-10, N.M.S.A. 1978, the time limited for the bringing of actions by minors is extended so that they have one year from the attainment of majority to commence the action. Thus, plaintiff's lawsuit was filed more than three years after the acts occurred, and more than one year after she reached majority, but less than three years after her psychic injuries first manifested themselves.

The trial court granted the motion on January 8, 1982. (Appendix C) Plaintiff filed a second lawsuit based on the same acts of the defendant claiming intentional infliction of emotional distress, invasion of privacy, and breach of the duty to protect the health and welfare of a child. Defendant moved for summary judgment on

grounds of res judicata, and the motion was granted by the trial court.

Plaintiff appealed both decisions to the Tenth Circuit Court of Appeals where they were consolidated and affirmed by that court on March 21, 1982. The opinion held that New Mexico law does not allow tolling the limitations period when the victim is aware of the tort. (Appendix A) The principal tort is a battery, and the statute of limitations begins to run immediately after the occurrence of the battery. Thus the claims for damages under the tort of assault and battery were barred as the limitations period had run. With respect to the claims under the tort of outrage, the court found that the injuries were a consequence of the original battery and not a separate cause of action. Thus, they were also barred.

On March 29, 1983, petitioner filed a timely petition for rehearing which was denied on April 14, 1983. (Appendix B)

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals Departed From the Accepted And Usual Course of Judicial Proceeding By Not Recognizing And Applying New Mexico Substantive Law In Its Review Of a Grant Of Summary Judgment.

The issue raised on this appeal is whether the Court of Appeals correctly applied the statute of limitations in affirming the district court's grant of summary judgment against the petitioner.

Petitioner's suit contained two causes of action for relief: assault and battery and the tort of outrage. (Appendix D, Complaint, p. 23a, § 3) The district court granted summary judgment on the ground that the limitations period for petitioner's claims had run. (Appendix C, District Court Memorandum Opinion, pp. 17a-18a) The court held that a cause of action for assault and battery arose immediately with the occurrence of the acts alleged and the

limitations period began to run at once. In New Mexico, the limitations period for actions arising out of personal injuries is three years. Section 37-1-8, N.M.S.A. 1978. Minors have an additional year upon reaching majority within which to bring an action. Section 37-1-10, N.M.S.A. 1978. Since the suit was filed more than three years after the assault and battery and more than one year after petitioner reached majority, it was barred.

With respect to the cause of action for the tort of outrage, the district court held that although the petitioner's psychic injuries first became physically manifest in January, 1980, they were "injuries" caused by the assault and battery. They were consequences of the original tort, and the limitations period started when the acts occurred. In effect, petitioner's claim

for damages under the tort of outrage was never recognized as a separate cause of action. (Appendix C, p. 18a) The Court of Appeals affirmed the decision of the district court, specifically agreeing that the psychic injuries claimed were not separable from those claimed under the tort of assault and battery. (Appendix A, Opinion of the Court of Appeals, p. 10a)

This application of the law of New Mexico by the district court and the Court of Appeals is in error. The tort of outrage is recognized in New Mexico as a cause of action wholly separate from the tort of assault and battery. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972), a medical malpractice case, dismissed the plaintiffs' claims of assault and battery as barred by the limitations period. However, the court allowed the

plaintiffs to proceed to attempt to prove the tort of outrage claim, even though it arose out of the same acts of the defendant, implicitly recognizing it as a separate cause of action.

In a more recent decision, Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981), the court stated that the tort of outrage can only be claimed if and when the psychic injury has occurred. The opinion quoted approvingly from the Restatement of Torts, 2d § 46 (1965):

> The rule stated in this section applies only where the emotional distress has in fact resulted, and where it is severe. (Emphasis supplied.)

97 N.M. at 214, 638 P.2d at 426.

Read together, Mantz and Dominguez make clear that an action for the tort of outrage is a separate and independent action, does not arise when the tortious

acts occur, but arises only when the psychic injuries manifest themselves.

This conclusion is consistent with the well established rule in New Mexico that the statute of limitations for a cause of action in tort runs from "the time of injury not the time of the negligent act." New Mexico Electric Service Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976). A wrong without damage or damage without wrong does not amount to a cause of action. Jensen v. Allen, 63 N.M. 407, 320 P.2d 1016 (1958).

In the present case the petitioner became aware of her emotional and psychic injuries at some time during January, 1980. Her claim is supported by the affidavit of Brock Morris, M.D., which stated that:

> The first time that Jane knew or could have known that she had actually suffered a psychic injury as a result of the

> earlier incestuous relationship between herself and her father would have been January, 1980.

(Appendix E, affidavit of Brock Morris, M.D., p. 34a)

Further, the trial court accepted "as true plaintiff's statement that her psychic injuries first became physically manifest in January, 1980." Appendix C, p. 18a) Thus, under the tort of outrage as recognized in New Mexico, petitioner's cause of action did not arise until January, 1980. Her suit, which was filed on September 8, 1981, was within three years of the injury and thus within the applicable limitation period.

Neither the Court of Appeals opinion nor the district court opinion ever acknowledge or even mention the cause of action for the tort of outrage despite the fact that it was pled in this case and is recognized as a separate cause of action in New Mexico.

Both opinions place petitioner's claim for psychic injuries within the cause of action for assault and battery. The Court of Appeals curtly dismissed petitioner's claim as "based on a theory of having become nervous." (Appendix A, p. 10a)

Under Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938) the Supreme Court held that in the non-federal area federal courts should loyally apply state substantive law. By ignoring the substantive law in New Mexico on the tort of outrage, the Court of Appeals has "far departed from the accepted and usual course of judicial proceedings." 28 U.S.C. Rules of the Supreme Court of the United States, Rule 17 (1980).

Petitioner also argues that the Court of Appeals did not apply the appropriate test in reviewing the decision of the district court granting

summary judgment. In Exnicious v. United States, 563 F.2d 418, 424 (10th Cir. 1977), the Court of Appeals stated that in a motion for summary judgment:

> The movant must demonstrate entitlement beyond a reasonable doubt, and if an inference can be deduced from the facts on which the opposing party might recover, summary judgment is inappropriate.

Since the district court accepted the Morris affidavit as true, it was conclusively established that the petitioner was not aware of her injuries before January, 1980. Since a cause of action for the tort of outrage does not arise before emotional injury has resulted, there was "an inference" which could be "deduced from the facts" on which the petitioner could recover. Therefore, the Court of Appeals was in error in affirming the decision of the district court.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and, after full briefing and oral argument, reverse and remand this cause for a new trial on the issue of damages under the tort of outrage, upon proper instructions.

Respectfully submitted,

SARAH M. SINGLETON

Post Office Box 2423
Santa Fe, New Mexico
87504-2423
(505) 988-4469

Attorney for Petitioner

June 13, 1983.

APPENDIX A

NOT FOR ROUTINE PUBLICATION

FILED United States Court of Appeals
Tenth Circuit, March 21, 1983
Howard K. Phillips, Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANE JENKINS,

Plaintiff-Appellant

v. Nos. 82-1101
and 82-1403

PHILIP R. JENKINS, SR.,

Defendant-Appellee.

Appeal from the United States
District Court
For the District of New Mexico
(D.C. Nos. Civ. 81-0746-HB and
Civ. 82-078-JB)

Submitted on the briefs.

David H. Pearlman, Albuquerque, Mexico, for appellant.

Philip Jenkins, Sr., appellee, appeared pro se.

Before DOYLE, McKAY and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

There are two distinct suits and they result in two appeals, both of which are presented here. The actions were in the United States District Court for the District of New Mexico on the basis of diversity of citizenship. The causes were disposed of on summary judgment grounds and this is the main issue before us.

The plaintiff is approximately 23 years of age. She brought an action in the United States District Court in which she alleged that between 1969 and

1972 when she was growing up, the defendant, her father, involved her in unconsented and illicit incestous contact with her.

She reached the age of majority in May 1978. In New Mexico the majority is reached at 18 years of age. The first complaint states a cause of action for assault and battery and intentional infliction of emotional distress or the tort of outrage. The case now in question is one which was presented to Chief Judge Bratton. On January 8, 1982 Judge Bratton entered an order dismissing the complaint on the ground that it was barred by the applicable statute of limitations § 37-1-8, N.M.S.A. 1978.

Subsequently the plaintiff filed another action which contained substantially the same allegations which were in the suit which was disposed of by Judge Bratton. The defendant, appearing

pro se, again moved for summary judgment. This time Judge Burciaga heard the case and he also granted the motion for summary judgment on the ground that the action was barred by the doctrine of res judicata; in other words there had been another action and an adverse judgment which finally disposed of the case. In effect it was ruled impossible to try out some other judge.

The first complaint alleged that the damages suffered by the plaintiff proximately resulting from the conduct of the defendant, did not manifest themselves at the time of the action. The allegation is that the plaintiff did not become aware of the damages or injury prior to January 1980, less than three years before the commencement of the cause of action.

Thus the plaintiff alleges that since she did not become fully aware of

the damages that she had suffered until the date that she mentions the statute of limitations cannot run until the date in 1980.

The defendant relies on the New Mexico statute of limitations. Chief Judge Howard Bratton dismissed the complaint on the ground that the statute of limitations had run. The ruling was made in the course of granting a motion for summary judgment. Seemingly all of the necessary facts were presented. Judge Bratton in his opinion stated that the plaintiff had alleged that from 1969 to 1972 her father subjected her and involved her in unconsented incestous contact which gave rise to a cause of action for assault and battery and to the tort of outrage.

Plaintiff reached the age of majority on May 16, 1978 and it is undisputed that since the three year

statute of limitations in New Mexico for injuries to the person ran while she was a minor, that thereafter, under the terms of the statute, she has one year from when she reaches majority within which to bring the action. N.M.S.A. § 37-1-8. See Slade v. Slade, 81 N.M. 462, 468 P.2d 627, 631 (1970). Ordinarily the statute bars an action in three years. In the case of a minor, although it runs from the time of the injury, a year of grace is given to a minor for one year after the child reaches 18. § 37-1-8, N.M.S.A. If the injury is hidden, the statute does not run until the injury is brought to the attention of the person injured. Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (Ct.App. 1977), cert. denied, 567 P.2d 485. The plaintiff contends that the limitation period did not begin to run until some injury from the

incestous contact manifested itself in a physically objective manner and was ascertainable.

Plaintiff relies entirely on Peralta. However, Peralta was a medical malpractice case in which the defendant, a surgeon, left a cottonoid in the plaintiff's body during surgery on February 15, 1971. This cottonoid was discovered during surgery which was performed on April 17, 1973 and the suit was filed January 8, 1976. The court held that the limitation period starts to run from the time the injury manifested itself in a physically objective manner and thus was ascertainable. But in Peralta the injury was not apparent. It could not be known by the injured person. A person cannot be compelled to start a lawsuit involving an injury about which he has no knowledge. Here the plaintiff-appellant was aware of the

gruesome acts when they were perpetrated.

Plaintiff maintains that she was not aware of the consequences of the defendant's activity until just prior to the filing of this lawsuit. However the New Mexico law does not go this far. It does not allow tolling the tort when the victim is aware of it. There the principal tort is a battery which has been committed and the tolling does not continue until she realizes some subjective consequences.

This case is different from Peralta. In that case there was a hidden infliction of injury. The plaintiff there had no chance to discover the malpractice. Here the defendants acts occurred in the late 1960s. Also all of the injuries are caused by the unlawful touching which is called an assault and battery. The psychiatric consequences

of the experiences are not separate and apart from the heinous acts which were perpetrated when plaintiff was a child. They are part of the original tort. The plaintiff was fully aware of the acts which she charges against her father. The statute of limitations started when those heinous acts occurred. However, the law gave the plaintiff appellant a year following her reaching majority to bring the action. She does not receive more time based on the theory of having become nervous at a time beyond the frame which is mentioned.

The trial court ruled that at the time the statute started to run and at the time she reached her majority the statute of limitations had run. We agree with this ruling.

We also affirm the judgment of Judge Burciaga dismissing plaintiff's second complaint based on res judicata.

The judgment of the district court should be and is hereby affirmed.

APPENDIX B

MARCH TERM - April 14, 1983

Before Honorable William E. Doyle, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

JANE JENKINS,

Plaintiff-Appellant,

vs. Nos. 82-1101
82-1403

PHILIP R. JENKINS, SR.,

Defendant-Appellee.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JANE JENKINS,

Plaintiff,

vs. CIV. NO. 81-746 HB

PHILIP R. JENKINS, SR.,

Defendant.

MEMORANDUM OPINION

This matter comes before the Court upon defendant's motion for summary judgment on the ground that plaintiff's cause of action is barred by the applicable statute of limitations, § 37-1-8, N.M. Stat. Ann. (1978). The Court has reviewed the memoranda of the parties, the entire record and the authorities. Accepting all of the facts alleged in the Complaint and affidavit submitted by plaintiff as true, the

Court regretfully concludes that defendant's motion is well taken and summary judgment should be granted.

Plaintiff alleges that from 1969-1972 the defendant, her father, subjected her to involuntary, unconsented and incestuous contact, giving rise to a cause of action for assault, battery and the tort of outrage. Plaintiff reached the age of majority on May 16, 1978 and it is undisputed that the three year statute of limitation in New Mexico for injuries to the person was tolled until that date. This suit was not filed, however, until September 2, 1981, more than three years from the time plaintiff came of age.

Citing Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (Ct. App. 1977), plaintiff contends that the limitation period did not begin to run until some injury from the incestuous contact

"manifested itself in a physically objective manner and was ascertainable." 90 N.M. at 394. Plaintiff maintains, tehrefore, that she first became chargeable with knowledge of her psychic injuries in January, 1980 when she began acting out depression and resultant thought disorder in a dramatic way. An affidavit submitted by Dr. Brock A. Morris, a psychiatrist who has been treating plaintiff since April, 1980, supports this factual allegation.

Plaintiff relies entirely on Peralta, supra, a medical malpractice case in which the defendant physicial had left a cottonoid in plaintiff's body during surgery on February 15, 1971. The cottonoid was discovered during surgery performed on April 17, 1983 and suit was filed January 8, 1976. Emphasizing that it is the occurrence of the injury and not the wrongful act

which starts the running of the statute, the court held that "the limitation period begins to run from the time the injury manifests itself in a physically objective manner and is ascertainable." In Peralta, therefore, the complaint was timely filed.

In the course of its opinion, the Peralta court noted that the plaintiff had alleged that his injuries from the cottonoid were "inherently unknowable." 90 N.M. at 394. The concurring judge focused on the fact that the plaintiff was blamelessly ignorant, concluding that "to require a man to seek a remedy before he knows of his rights is palpably injust." 90 N.M. at 397. While superficially the language of Peralta cited by the plaintiff seems to support her argument, the case at hand is so factually disparate that Peralta

does not provide the precedent plaintiff requires to sustain her position.

It is hornbook law that the establishment of a technical cause of action for assault or battery entitles a plaintiff to an award of nominal damages even if the unconsented contact was entirely harmless. The wrongful act itself constitutes the requisite injury. W. Prosser, Law of Torts, pp. 35-38 (4th ed., 1971). That New Mexico law adheres to this position is demonstrated in Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978); "... the tort of battery is the wrongful touching of the patient's body which by itself gives the patient a claim for substantial damages . . . . the law does not require the patient to be physically damaged by the intervention. Even if his health is significantly improved, the doctor is still liable." The "wrongful act" here

occurred at the time of the alleged assault and battery; consequently, this was also the time plaintiff first suffered injury from the wrongful act.

The Peralta decision was predicated on the fact that a person who suffers injury at the hands of a negligent physician is usually "blamelessly ignorant" that they have a maintainable cause of action. The injury is "inherently unknowable" because it often does not give rise to any "recognizable harm" until well after the limitation period has expired. Although accepting as true plaintiff's statement that her psychic injuries first became physically manifest in January, 1980, the Court cannot agree that her injuries were inherently unknowable in May, 1978. This is especially true when the mere establishment of the tort of assault and battery demonstrates that plaintiff

suffered injury even absent any evidence of psychic damage.

Rather than Peralta, plaintiff's situation is more akin to the case of Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979), where the plaintiff sued an attorney for the negligent drafting of a will. The plaintiff therein argued that her cause of action did not arise until the will was denied probate because her harm or damage was not ascertainable before that time. But plaintiff had engaged several different attorneys in succession in regard to the probate of the will and the Court held that she was in a position to ascertain or discover the harm to her each time she changed attorneys. Plaintiff in the case at hand was in a position to ascertain or discover her injuries from defendant's alleged conduct when she reached the legal age of majority.

The Court, therefore, concludes that the plaintiff suffered a reasonably recognizable injury in May, 1978 when she came of majority. The limitation period began to run at that time and had expired by the time the Complaint was filed in September, 1981. An order granting defendant's motion and dismissing this action will be filed in accordance with this opinion.

s/ Howard Bratton

Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JANE JENKINS,

Plaintiff,

vs. CIV. NO. 81-746 HB

PHILIP R. JENKINS, SR.,

Defendant.

C O M P L A I N T

Plaintiff states:

COMMON ALLEGATIONS

A. Plaintiff is a citizen of of (sic) the State of New Mexico. Plaintiff has reason to and therefore does believe and allege that Defendant is a citizen of the State of Michigan.

B. The amount in controversy herein exceeds the sum of Ten Thousand

Dollars ($10,000.00), exclusive of costs and interest.

C. This is a tort claim for damages, the direct and proximate result of the acts of Defendant, which damages occurred to Plaintiff in the State of New Mexico.

B. This Court has jurisdiction pursuant to 28 U.S.C. Code §1331. Venue is properly laid in the District of New Mexico as it is the residence of all of the Plaintiffs. Service of process can be obtained over to the Defendant by reason of the New Mexico Long Arm Statute, commission of a tortious act within this State.

FIRST CAUSE OF ACTION

Plaintiff further states:

1. Plaintiff is the natural daughter of Defendant.

2. Beginning in 1969 an continuing off and on until 1972, Defendant had

involuntary, unconsented, illict and incestuous contact with the Plaintiff.

3. That such acts on the part of Defendant, constituted the tort of assault and battery and, additionally, the tort of outrage.

4. That the aforesaid tortious acts were committed upon plaintiff while she was still a minor, she not having attained the age of majority until May 16, 1978.

5. That as a direct and proximate consequence of the aforesaid tortious conduct on the part of Defendant, Plaintiff has suffered severe, disabling and permanent injuries of an actual and general nature and will into the future continue to suffer severe and disabling injuries of an actual and general nature, both mental and physical, in a sum which cannot be precisely determined at the present time but will in all

probability exceed, at the minimum, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

6. That, additionally, the conduct on the part of the Defendant is so offensive to the norms of society as to constitute grounds for an award of punitive damages in a sum determined by the jury to be adequate in the premises but in no event to be less than at least Plaintiff's actual and general damages to date, or the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

7. That the damages suffered by Plaintiff proximately resulting from the conduct of Defendant, as aforesaid, did not manifest themselves for the first time, nor is Plaintiff chargeable with knowledge of such damages, prior to January 1980, less than three (3) years prior to the commencement of the within cause of action.

WHEREFORE, Plaintiff demands Judgment from and against Defendant for actual and general damages, of a compensatory nature, in at least the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), for punitive damages, in at least the additional sum of Two hundred Fifty Thousand Dollars ($250,000.00), and for her costs herein.

PEARLMAN & DIAMOND, P.A.

By: /s/ David H. Pearlman
DAVID H. PEARLMAN
Attorneys for Plaintiff
400 American Bank of Commerce
200 Lomas Boulevard, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 266-8737

APPENDIX E

FILED United States District Court
Albuquerque, New Mexico
December 14, 1981
Jesse Casaus, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JANE JENKINS,

Plaintiff,

vs. No. CIV 81-0746 HB

PHILIP P. JENKINS, SR.,

Defendant.

A F F I D A V I T

STATE OF TEXAS)
) ss.
COUNTY OF EL PASO)

I, BROCK A. MORRIS, M.D., being first duly sworn upon my oath depose and state as follows:

1. My name is BROCK A. MORRIS and I am a physician in private practice at 1250 East Cliff, Suite 3C, El Paso, Texas 79902, specializing in psychiatry.

2. That I received a BS Degree in Marine Biology from Texas A&M University in 1970. That I then completed Invertegrate Ecology work on a Ph.D. at Texas A&M University during the years 1970 to 1972. I received my M.D. Degree from the Medical School at the University of Texas Medical Branch, Galveston, Texas, in 1975. I then completed a Residency in the speciality of Psychiatry also at the University of Texas Medical Branch at Galveston, Texas during the period 1975-1978.

3. I was Chief Resident in the speciality of Psychiatry at the University of Texas Medical Branch at Galveston during the period 1977-1978. During the 1978, I was also Medical Director of the Child Guidance Center, El Paso, Texas as well as Assistant Medical Director of the El Paso Department of Mental Health and Mental

Retardation. From 1978 until the present, I have served as Medical Director for the Jewish Family and Childrens' Services of El Paso, Texas. From 1980 through the present, I have been President of the El Paso Clinical Consultants, Inc., in El Paso, Texas. Also, from 1980 through the present I have been Medical Director, Sun Valley Hospital, Adult Unit, El Paso, Texas.

4. From 1976 to 1978, I served on the Council on International Affairs of the American Psychiatric Association.

5. While at the University of Texas Medical Branch at Galveston, Texas, my teaching responsibilities were primarily concerned with teaching Junior and Senior Medical Students. I was also concerned with the responsibility for liaison education of nurses, aides, and other paraprofessionals, both informally and formally. This was all in the

specialty of Psychiatry.

6. The scholastic honors that I have enjoyed during my academic career, consist of the following: I was a Cum Laude graduate of Texas A&M University in 1970; I was a member of the Phi Kappa Phi Honor Society for the Sciences during the year 1969; I received Honorable Mention Status with the National Science Foundation for Research in the year 1971; I was awarded the W. J. Hildebrandt Scholarship in 1973 at the University of Texas Medical Branch at Galveston; I was the first recipient, in 1975, of the Hamilton Ford Award for excellence in the study of Psychiatry during my residence training in Psychiatry at the University of Texas Medical Branch in Galveston; I was President of Phi Rho Sigma Medical Fraternity during the year 1974; and I received the Upjohn Achievement Award in

1976 while at University of Texas Medical Branch at Galveston.

7. I am a member of the Texas Medical Association, the Titus Harris Clinic Society, and have been an elected member of the American Psychiatric Association since 1976.

8. My first contact with JANE JENKINS was on April 14, 1980 on a hospital consultation at Providence hospital in El Paso, Texas. The diagnosis at that time was temporal lobe seizure disorder; chronic organic brain syndrome, and psychotic depressive reaction. Treatment generally consisted of intensive individual insight-directed supportive psychotherapy. Follow-up visits with JANE in Providence Memorial Hospital in El Paso were conducted by me and treatment rendered on the following dates: April 15, 1980, April 16, 1980, April 17, 1980, April 18, 1980, April

19, 1980, April 20, 1980, April 21, 1980, April 22, 1980, April 23, 1980, April 24, 1980, April 25, 1980, April 26, 1980, April 28, 1980, April 29, 1980, April 30, 1980, May 1, 1980, May 2, 1980, May 3, 1980, May 4, 1980, May 5, 1980, May 6, 1980, May 7, 1980, May 8, 1980, May 9, 1980. On May 9, 1980 I discharged JANE from the hospital. However, on June 2, 1980 she was again admitted to Vista Heights Hospital where I visited her. From June 2, 1980 through October 10, 1980, when she was discharged, she remained admitted to Vista Heights Hospital in El Paso with the specific exception of two (2) week-ends, one in September, 1980 and one in August, 1980 when she was permitted to go home, to be readmitted the following weekday. During that period of time, I saw and treated her at Vista Heights Hospital on a daily basis for the three

(3) conditions that I have set forth in my diagnoses above.

9. JANE has remained in my care for treatment for the specific diagnoses above and I have not released her at this time.

10. Based upon the history that I have obtained from JANE during the time that I have been treating her, it is my professional opinion that there was actually very little in the way of a positive or manifest psychiatric history which could be recognized by either JANE or other members of society and would show itself by aberrant behavior. Instead, JANE was very much the opposite; that is, a very compliant and quite compulsive young woman who rarely came into conflict with society. From the onset of my treatment, it was evident that JANE had a significant depression and resultant thought disorder that

resulted from years of suppression of feelings with regard to the incestuous relationship that she had had with her father. In addition to this, she has a temporal lobe seizure disorder that is actually a physical illness that is not the result of development problems or any significant event in her past.

11. JANE's behavior by which she acted out her depression in a dramatic way and that first became evident to her began in January 1980 and is casually connected to what occurred years before between her father and herself. Since January 1980, JANE began to go through essentially a year and a half of extremely dangerous acting out behavior that involved not only herself but other people. It was through my work as her Psychiatrist and that of the other professions I called upon for assistance, including Psychologists, in uncovering

the illicit aspects of the relationship her father had with her, "unlocked Pandora's box". She became for the first time destructive and very difficult to work with. Fortunately, however, we have seen progress with her in working through these issues and in her improvement.

12. I repeat that, in my professional opinion, the first time that JANE knew or could have known that she had actually suffered a psychic injury as a result of the earlier incestuous relationship between herself and her father would have been January 1980 when the long suppressed results of the depression and resultant thought disorder casually connected to that incestuous relationship with her father first began to be acted out by her in a dramatic manner. Thus, January 1980, would be the first time that JANE's psychic

injury would have manifested itself to her in a physically objective manner and was ascertainable.

BROCK A. MORRIS, M.D.

SUBSCRIBED AND SWORN to before me this 11th day of December, 1981, by BROCK A. MORRIS, M.D.

Deborah B. Gutierrez
Notary Public
State of Texas
Certified in El Paso County
July 8, 1983

My Commission Expires:

(SEAL)